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No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
Appellants,

RONALD and CATHERINE SOKALSKI
and TWYLLA FLANDERS,
Intervenors-Appellants

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO INTERVENE AS APPELLANTS AND BRIEF OF INTERVENORS-APPELLANTS RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

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MOTION FOR LEAVE TO INTERVENE OF RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

Ronald and Catherine Sokalski, as natural parents and legal guardians of a minor child in the New Jersey public

school system, and Twylla Flanders, a teacher in the New Jersey public school system, move on behalf of themselves and others similarly situated for leave to intervene in this appeal to support the New Jersey moment of silence statute, N.J.S.A. 18A: 36-4 ("Section 36-4").

1. The Sokalskis reside in Little Falls, New Jersey, and their daughter, Lara, attends the fourth grade at the Little Falls Elementary School No. 1, a public school to which the statute is applicable.[1] App., *infra*, 1a, 3a.

The Sokalskis believe that a daily moment of silence at the outset of the school day, which would allow their daughter to meditate or pray or just relax, would be a positive and non-trivial element of their daughter's education. App., *infra*, 2a, 4a. Moreover, the Sokalskis believe that the New Jersey statute, which will permit their daughter's teachers to begin each day with a moment of silence, does not promote or establish religious practices in the schools. App., *infra*, 2a, 4a. On the contrary, the Sokalskis believe that the statute furthers individual liberty in a way that is religiously neutral. But more important, they are convinced that a moment of silence has a beneficial effect on the educational environment in which their daughter spends a considerable portion of her day. App., *infra*, 2a, 4a.

Twylla Flanders is a public school teacher at the Wandell Elementary School in Saddle River, New Jersey. App., *infra*, 5a. Mrs. Flanders believes that it is appropriate and educationally beneficial to begin the school day with a moment of silence. App., *infra*, 5a-6a. Although Mrs. Flanders in the past has used a moment of silence to open the school day, and has found it beneficial to the maintenance of a classroom atmosphere conducive to learning, she does not currently do so. App.,

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[1] For the Court's convenience, intervenors have printed their affidavits as an appendix to this filing. An original and copies of the affidavits also have been filed with the Clerk of the Court.

infra, 6a. In the absence of a valid state law authorizing her to use a moment of silence in the public schools, Mrs. Flanders is constrained from conducting a moment of silence by the threat of civil liability against herself and her school. App., *infra*, 6a.

Where the "interests of justice" so require, this Court clearly has authority to permit a party to intervene in the first instance in this Court. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* at 339-40 (6th ed., 1986); Fed. R. Civ. P. 24; *cf.* Fed. R. Civ. P. 21. Moreover, the Court has not infrequently permitted such intervention in the past. *See, e.g., Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978); *Eastern-Central Motor Carriers Assoc.* v. *United States*, 321 U.S. 194, 198 (1944); *United States* v. *Teriminal Railroad Assoc.*, 236 U.S. 194, 196 (1915). There is a compelling justification for intervention in this case because developments since the decision of the court of appeals have caused the issue of appellants' standing in this case to be placed in doubt. See 55 U.S.L.W. 3512 (January 27, 1987).

In an analogous situation in *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952), this Court granted a motion to add three new party plaintiffs to a case pending before the Court where the defendant had challenged, for the first time, the standing of the original plaintiffs. Relying on the joinder provisions in Rule 21 of the Federal Rules of Civil Procedure, the Court permitted the addition of new parties to "remove the matter [*i.e.*, the standing issue] from controversy" after finding that the addition "can in no wise embarrass the defendant" and would avoid the "needless waste" that would result from dismissing the case on the standing issue.

In the present case, appellants' standing became an issue only after the last election in New Jersey, which occurred after the court of appeals issued its opinion. See Letter from William W. Robertson, counsel for appellants to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States (May 6, 1986). If the Court

were to hold now that appellants no longer have standing [2] and if the Court does not grant movants' request to intervene, then the decision below, which movants believe is erroneous, will be allowed to stand, and a state's statute beneficial to movants will become a nullity. In such a case, the injury to movants' interests is obvious. Movants are clearly the intended beneficiaries of the New Jersey statute and they will lose completely the benefit of that statute unless they are permitted now to assert their interest and defend the statute's constitutionality. Moreover, an issue of national significance will escape review by this Court because of a fortuitous coincidence of pleading and a change in the named appellants' legislative status. Accordingly, the Court should grant movants' leave to intervene to defend the statute.

2. Movants clearly meet the requirements of the three-part test for intervention of right in the federal courts.[3] See *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971); see also 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 1908 at 262 (1986). First, they have a "significantly protectable interest" in the subject matter of the litigation. *Donaldson*, *supra*, 400 U.S. at 531. In this case, New Jersey has attempted

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[2] Appellants have informed movants that appellants will argue that they still have standing in this case. Movants, by seeking to intervene in order to "remove this matter from controversy," do not intend to cast any doubt on the validity of appellants' argument on this issue. Appellants, whose ultimate interest is to have the constitutionality of the State's statute resolved by this Court, have authorized us to inform the Court that they support this motion. Moreover, appellants have authorized us to inform the Court that they will consent to divided argument if the motion is granted.

[3] This same test is applicable while a case is pending in the district court and following entry of judgment. *See United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 387 and 395 n.16 (1977). If the court concludes that movants do not meet the requirements for intervention of right, we respectfully request that this court exercise its discretion to grant permissive intervention. *See* Fed. R. Civ. P. 24(b).

to accommodate the religious preferences of some families, such as the Sokalskis, without interfering with the religious liberty of others, such as appellees. The Sokalskis have a significant stake in protecting that state-conferred right. Moreover, the Sokalskis obviously have a significant interest in the education and upbringing of their daughter, an interest that is directly affected by the New Jersey moment of silence statute. Indeed, their interest in their child's education and development is an interest this Court has recognized as "fundamental." See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Carey* v. *Population Services International*, 431 U.S. 678, 685 (1977). Similarly, movant Flanders, like many other teachers in New Jersey, has used the moment of silence as part of her teaching method and for pedagogical reasons would continue to do so but for the doubt created by the decision of the court below, holding the New Jersey statute unconstitutional, and the risk of a civil rights suit by persons like the appellees who believe any moment of silence unconstitutionally advances religion. Accordingly, movants' interest in this case is sufficient to support intervention.

Movants also meet the second requirement for intervention: the outcome of this litigation may impair or impede their expressed interest. See Wright, Miller and Kane, *supra* at 262, 305-312. As noted, movants strongly support the statute at issue in this case; as a "practical" matter,[4] this is movants' only opportunity to argue in support of the statute. The Sokalskis' state-conferred interest in having their religious preferences accommodated will be destroyed if this appeal is dismissed and the court of appeals' judgment of unconstitutionality left unreviewed. In addition, without the protection of a state law

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[4] *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977) (courts should look to "practical consequences" of denying intervention in determining whether outcome of litigation may impair or impede intervenors' interest).

providing for a moment of silence, few public school teachers in New Jersey, such as Mrs. Flanders, would be willing to risk potential liability under 42 U.S.C. § 1983 by beginning each day with a moment of silence.

Under the final element of the three-part test, movants should be allowed to intervene because they meet the "minimal" burden of showing that "representation of [their] interest *'may be' inadequate.*" *See Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). If this Court concludes that the present appellants lack standing, then the representation of movants' interests clearly will be inadequate.[5]

The final consideration is whether the motion to intervene is "timely." See Fed. R. Civ. P. 24(a). In determining whether intervention is appropriate, the passage of time is but one factor to be considered; the most important consideration is whether the delay has prejudiced the other parties. Wright, Miller and Kane, *supra* at 435; see also *McDonald* v. *E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). Appellees cannot claim any prejudice from the presence of intervenors in this litigation. This suit obviously was filed as a test case raising the fundamentally legal issue of the constitutionality of the New Jersey moment of silence statute and seeking to enjoin the moment of silence statewide. It was brought by many of the appellees in this Court on behalf of minor children in the public schools. The Sokalskis merely seek the same opportunity on behalf of their daughter to pre-

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[5] Obviously, the state appellants and movants will both argue that the statute in question is constitutional. but that is the extent of the identity of their interest. Appellants assert an institutional interest; movants have a direct and personal interest in the state statute. Courts often have noted that the government and private litigants do not share an identity of interest. *See Dimond* v. *District of Columbia*, 792 F.2d 179, 192-193 (D.C. Cir. 1986); *NRDC* v. *Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

sent their legal arguments in favor of the constitutionality of the statute and to assure that this Court has a clear Article III basis for rendering a decision on this issue.[6]

Respectfully submitted,

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[6] It is clear that movants could file a brief as *amici curiae*, and, if they did, appellees would be required to answer a 30 page brief. The only possible prejudice from granting intervention at this time would occur if movants filed a brief in excess of the 30 page limit for a brief as *amici curiae*. To avoid imposing any additional burden upon appellees, intervenors have limited their brief on the merits to 30 pages.

QUESTION PRESENTED

Whether a facially neutral statute permitting public school students to observe a one minute period of silence for quiet and private contemplation or introspection violates the Establishment Clause because one of its purposes is to permit prayer by those who want to pray.

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BRIEF OF INTERVENORS-APPELLANTS RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

STATUS OF INTERVENORS-APPELLANTS

Contemporaneously with the filing of this brief, intervenors-appellants have filed a motion for leave to intervene with supporting affidavits and legal argument.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-61a) is reported at 780 F.2d 240 (3d Cir. 1985). The opinion of the district court (J.S. App. 62a-100a) is reported at 572 F. Supp. 1561 (1983).

JURISDICTION

The judgment of the court of appeals (J.S. App. 103a) was entered on December 24, 1985. The Jurisdictional Statement was filed March 19, 1986. On January 12, 1987, the Court granted review of the appeal, but postponed ruling on the question of jurisdiction pending a hearing on the merits. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

N.J.S.A. 18A: 36-4 (West 1982) provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT

1. The New Jersey Moment of Silence Statute, Assembly Bill 1064, described by its 55 sponsors as "[a]n Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day" (J.S. App. 110a), was introduced in the New Jersey Assembly on March 8, 1982. The explanatory statement attached to the bill provided simply that the

provision "allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student." J.S. App. 111a.

Following its introduction, the bill was referred to the Education Committees of the Senate and Assembly which filed reports stating—in language virtually identical to the statute itself—that the measure "permit[s] students to observe one minute of silence before the opening exercises of each school day" to be "used solely at the discretion of the individual student for quiet contemplation or introspection." J.S. App. 13a. The legislative reports added that the bill was based upon a Massachusetts statute that had been upheld against a challenge under the Establishment Clause of the First Amendment. J.S. App. 14a; see *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three-judge district court).

Although the New Jersey Legislature does not preserve transcripts of committee hearings or floor debates (J.S. App. 14a), the legislative discussion surrounding the bill attracted considerable media attention. Several remarks reported in the press reflected the desire of a few individual legislators to accommodate some students' interests in voluntary prayer in the public schools.[1] The press reports, however, also included statements of "several legislators" that "the bill had nothing to do with prayer."[2]

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[1] *See, e.g.*, Ernest Tollerson, *The Philadelphia Inquirer*, October 19, 1982 (quoting Senate President Carmen Orechio) ("'[m]ost of our youngsters are well meaning, are disciplined, don't cause problems for society in general, but I think if we had more prayer, more religion, a lot of the problems that are brought to us by our youngsters would be eliminated and avoided'"); Jim Goodman, *The Trenton Times*, October 12, 1982 (quoting Senator Francis McManimon). Appellees provided these newspaper excerpts to the court of appeals in a letter brief filed with the court following oral argument. Appellees' Letter Brief, *May* v. *Cooperman*, Nos. 83-5890 and 84-5126 (3d Cir., Aug. 29, 1985) 2 (hereafter cited as "Appellees' Letter Brief").

[2] Jim Goodman, *The Trenton Times*, October 19, 1982. *See, e.g.*, Robert G. Seidenstein, *The Star Ledger*, October 25, 1982

The bill was passed by both houses of the State legislature, but was vetoed in early December by Governor Thomas Kean. That veto was overridden by the respective votes of the Assembly on December 13, 1982 and the Senate on December 16, 1982. Press reports reflect that the measure was enacted over the governor's veto at least in part to "help restore order in the classroom." [3] The bill became effective immediately, shortly before the 1982 Christmas school recess. N.J.S.A. 18A: 36-4 (West 1982).[4]

2. On January 19, 1983, appellees, a group of parents, students and a teacher opposed to implementation of a moment of silence in the public schools, commenced this litigation seeking declaratory and injunctive relief against the Commissioner of the New Jersey Department of Edu-

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(quoting Assemblyman James Zangari, principal sponsor of the bill) ("'[R]egardless of what some people say, this is not a prayer bill. Rather, it would allow each student to participate in a one-minute period of voluntary silence to be used at his or her discretion'"); Robert G. Seidenstein, *The Star Ledger*, December 2, 1982 (quoting Assemblyman Zangari). Appellants provided these newspaper excerpts to the court of appeals in a letter brief filed with the court following oral argument. Appellant's Letter Brief, *May* v. *Cooperman*, Nos. 83-5890, 84-5126 (3d Cir., Aug. 19, 1985) 4-5 (hereafter cited as "Appellant's Letter Brief").

[3] Robert G. Seidenstein, *The Star Ledger*, December 14, 1982 ("Assemblywoman Angela Perun (D-Union) said the bill would help restore order in the classroom, adding, 'we need all the discipline we can muster in the schools' . . . Assemblyman John Rocco (R-Camden) argued that the bill did not touch on religion but simply permitted teachers and students 'to spend some moments in reflection'"). Appellant's Letter Brief 1. *See also* Jim Goodman, *The Trenton Times*, December 14, 1982; John Shure, *The Bergen Record*, December 14, 1982; Nancy Freiberg, *The Courier-Post*, December 14, 1982; Robert G. Seidenstein, *The Star Ledger*, December 17, 1982; Jill Pollack, *The Trenton Times*, December 3, 1982. Appellant's Letter Brief 3-5.

[4] The text of the statute was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. J.S. App. 8a.

cation, the Department itself, the Edison Township Board of Education and the Old Bridge Township Board of Education. The action was founded upon 42 U.S.C. § 1983 and sought declaratory and injunctive relief. Appellees asserted, among other things, that the statute violated the Establishment Clause of the First Amendment. J.S. App. 4a.[5] On the day the complaint was filed, the district court issued a temporary restraining order enjoining observance of a moment of silence pursuant to the statute. *Id.* at 5a. When it became apparent that the Executive Branch would not defend the provision, the district court permitted the New Jersey legislature to intervene to defend the constitutionality of the moment of silence statute.[6] Thereafter, the parties consented to an order enjoining the exercise of rights under the statute pending trial on the merits. *Id.* at 6a.

Trial commenced on September 13, 1983. Appellees' evidence fell into five categories: "testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and [numerous] prior bills proposing moments of prayer or moments of silence." J.S. App. 48a (Becker, J., dissenting).

In an attempt to establish that the purpose for the moment of silence statute was religious in nature, three

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[5] Appellees also argued that the statute violated the Due Process Clause of the Fourteenth Amendment as well as the New Jersey Constitution. Neither the district court nor the court of appeals addressed these claims.

[6] The district court permitted the New Jersey Senate, the New Jersey General Assembly and the respective President and Speaker for those two legislative bodies to intervene. J.S. App. 5a. Compare the procedures followed in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *United States* v. *Lovett*, 328 U.S. 303 (1946).

witnesses testified that some legislators wanted to accommodate voluntary prayer.[7] The witnesses also "testified to legislators' statements that the statute had a secular purpose." *Id.* at 48a-49a (Becker, J., dissenting).[8] Newspaper clippings also demonstrated that secular as well as religious concerns animated the actions of individual legislators. See *supra* notes 1-3 and accompanying text.

Appellees' witnesses opined as to how Section 36-4 was perceived by various organizations, such as the New Jersey School Board Association, the American Baptist Churches of New Jersey, and the public. J.S. App. 71a-73a. They characterized the statute "as an attempt to return prayer to the public schools in another guise." *Id.* at 71a.

On the question of the pedagogical value of the statute, the district court heard appellees' expert testimony "that

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[7] Typical of the testimony relied upon by appellees is the following statement by Reverend Sarfaty (Appellee's Letter Brief 9):

> Question: How about Senator Brian Kennedy? Do you have any recollection of any statements made by Senator Kennedy?
>
> Answer: Yes, I do, because I got to know him pretty well, especially in debates over the subject away from the Assembly or the Senate.
>
> He said that: Nobody knows what the kids are doing, but he hopes they are praying.

[8] Miss Rhodes, for example, testified that she recalled a statement by Assemblyman Zangari "that the intent [of the statute] was basically to provide the minute of silence at the beginning of the school days." Appellants' Letter Brief 6. Mr. Chuman, in a fairly lengthy exchange set out by Judge Becker (J.S. App. 49a n. 7), testified that Assemblyman Zangari had stated that "he thought that the moment of silence would be useful in the schools and would serve an educational purpose." Appellants' Letter Brief 8. Reverend Sarfaty further recalled that "the debate was: Did we need this thing to change the climate and life of our school system? The majority of the Senators felt we did. As far as I could see, they really didn't think any prayer issue was relevant one way or another so long as it had this effect." *Id.* at 9-10.

the moment of silence before class would not be a valuable educational tool." J.S. App. 56a (Becker, J., dissenting); see J.S. App. 83a-84a (moment of silence "has little educational justification"). Appellants' experts, by contrast, testified "that the minute of silence served a useful pedagogical function by creating a boundary between school and non-school time" which was important "because it would emphasize to the students the importance of the school hours, and the fact that school hours were a time for serious work rather than undisciplined play." *Id.* at 56a (Becker, J., dissenting). In addition, appellants introduced testimony by educators who had extensive favorable experience with a local moment of silence policy.[9]

The final category of evidence considered by the district court consisted of prior prayer and/or moment of silence bills debated by the New Jersey legislature. The evidence reflected several attempts during the 1970s to enact a law providing for school prayer, none of which

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[9] Appellants introduced evidence that the Sayreville (New Jersey) Board of Education adopted a moment of silence policy in 1969. J.S. App. 73a. Since that time, "all the Sayreville public schools have commenced the day with opening exercises which culminated in a moment of silence." *Id.* A teacher who had administered the moment of silence for an extended period testified that "[n]o parents or children ever expressed concern about the practice, and [she] viewed the ceremony as a helpful way to start the school day." *Id.* at 74a.

Appellants also submitted the results of a study in the Las Cruces, New Mexico Public School District by Dr. Calvin Thompson, who testified at trial. Dr. Thompson studied the effect of a moment of silence "by televising a number of classrooms before, during and after the moment of silence, by watching the period of silence and by conducting structured interviews with students. On the basis of his study Dr. Thompson concluded that most persons viewed the moment of silence as simply silence and not as prayer." J.S. App. 79a.

succeeded in becoming law.[10] Subsequently, the legislature shifted to the concept of a moment of silence which was enacted in 1982.[11]

The district court, on the basis of the above record, concluded that the moment of silence statute violated all three prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The court reasoned that the moment of silence provision failed the "purpose" prong of *Lemon* because the secular motivation behind the statute was not "overwhelming[ly] obvious and important" (J.S. App. 91a). Despite finding that "in combination with the flag salute and a song a brief period of silence serves a transition purpose" (*id.* at 83a), the court held that the "purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill." *Id.* at 87a. Because the trial court found that the "purpose of [the statute] was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer" (*id.* at 86a), it determined that the statute violated the "effect" prong of *Lemon* by

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[10] The evidence showed that on three occasions, bills were introduced that would have provided for voluntary recitation of the Lord's Prayer. S.B. 1296 (1976 session); S.B. 472 (1978 session); S.B. 594 (1980 session). None of these prayer measures was enacted. In 1968-1970, the legislature did pass bills that would have mandated a "brief period of silent prayer or meditation," but these measures were vetoed by the governor. A.B. 640 (1968); A.B. 146 (1969); A.B. 597 (1970). In 1980 and 1981, several bills were introduced that did not refer to prayer but instead provided for mandatory participation in a moment of silence in the classroom; one of these moment of silence bills was enacted in 1981 but was vetoed by the governor. A.B. 1028 (1980); A.B. 342 (1980); A.B. 2197 (1981).

As noted, *supra* p. 4, Section 36-4, the voluntary moment of silence statute at issue in this case was passed by the New Jersey legislature in 1982.

[11] Compare S.B. 1296 (1976 session); S.B. 472 (1978 session); S.B. 594 (1980 session) with Section 36-4.

both "advanc[ing] and inhibit[ing] religion." *Id.* at 94a. Finally, the moment of silence was found to be unduly "entangling" because a "required minute of silence would pit children and parents who believed in prayer in the public schools against children and parents who do not." *Id.* at 98a.

The court of appeals, by a divided vote, affirmed. The court disagreed, however, with virtually all of the district court's reasoning. The court of appeals repudiated the assertion that the statute was unconstitutionally "entangling" because of its potential for divisiveness. *Id.* at 17a (citing *Lynch* v. *Donnelly*, 465 U.S. 668, 684 (1984)). The court of appeals noted that, "[i]f political divisiveness were the test for entanglement, no governmental accommodation of religion would survive Establishment Clause scrutiny. The law is otherwise." J.S. App. 17a. The court then rejected the holding below that the statute violated the "effect" test simply "by designating a time and place when children and teachers may pray." *Id.* at 22a. "The state," the court of appeals wrote, "equally injects itself into religious matters when it designates a time and place when children and teachers may not pray." *Id.* The court of appeals, however, held that the moment of silence statute foundered upon the "purpose" prong of *Lemon*.

The court declined to set aside the district court's finding that the statute's purported secular purpose was "pretextual." J.S. App. 27a. The court of appeals nevertheless considered whether the statute survived constitutional scrutiny as a permissible accommodation of religious beliefs. Noting that there was no basis for finding that "teachers had encouraged voluntary prayer over other alternative uses of the minute of silence" (*id.* at 26a), the court concluded that a holding that the purpose of the statute "was to encourage prayer over other alternatives . . . would [not] be sustainable" (*id.* at 29a). Thus, the court reasoned that "the question pre-

sented by this appeal narrows to this: May the state . . . take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray?" *Id.* Finding no "clear answer" from the opinions in this Court's recent decision in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), the court gave a negative response—virtually without explanation. J.S. App. 29a.[12]

Judge Becker filed a lengthy dissent. "[T]he panel has concluded that the statute has no impermissible effect and fosters no excessive governmental entanglement with religion. As I see it, under these circumstances, only extremely clear proof that the law is devoid of a secular purpose would justify our holding it unconstitutional; such proof was not produced in this case." J.S. App. 32a (Becker, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

Two years ago this Court invalidated a unique state statute which authorized a period of silence for "meditation or voluntary prayer." *Wallace* v. *Jaffree*, 472 U.S. 38, 40 (1985). The Court did so, however, only because Alabama's statute "had *no* secular purpose" (*id.* at 56) (emphasis in original), as evidenced by the unambiguous declarations of its legislative sponsor[13] and the existence of another facially neutral moment of silence provision

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[12] The court of appeals did note (J.S. App. 29a) that this Court had invalidated a "statute that was designed to accommodate religious views" in *Estate of Thornton* v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985), but ignored the fact that the decision in *Thornton* was based on the "effects" prong of the *Lemon* test—which the court of appeals already had concluded was satisfied here. J.S. App. 17a-22a.

[13] The principal legislative sponsor of the Alabama statute, when asked "whether he had any purpose for the legislation other than returning voluntary prayer to public schools . . . stated, 'No, I did not have no other purpose in mind.'" 472 U.S. at 57.

already in effect in the State.[14] *Id.* at 56-59. Under those circumstances, the Court concluded that the statute was constitutionally infirm because it was "enacted to convey a message of State endorsement and promotion of prayer." *Id.* at 59. But, a majority of the Court indicated that a moment of silence statute that did not endorse prayer would withstand scrutiny under the Establishment Clause. See *id.* at 62 & n.2 (Powell, J., concurring); *id.* at 72-73, 76-77 (O'Connor, J., concurring); *id.* at 87-89 & n.4 (Burger, C.J., dissenting); *id.* at 90-91 (White, J., dissenting); *id.* at 113-114 (Rehnquist, J., dissenting). The court of appeals here specifically held that the New Jersey moment of silence statute does not "encourage prayer over other alternatives." J.S. App. 29a. Accordingly, the statute should have been upheld.

1. The New Jersey moment of silence statute satisfies all three prongs of the *Lemon* test. With respect to effects and entanglement, the court of appeals was correct that the moment of silence statute in New Jersey clearly passes constitutional muster. Student silence has no religious effect—primary, secondary or otherwise. Neither is there any entanglement. The crucial inquiry, then, is whether the statute has any legitimate secular purpose, and on this issue the court of appeals has misread this Court's precedents, particularly *Wallace* v. *Jaffree*. As noted above, a majority of the Court in that case (and perhaps the entire Court) said that properly drawn moment of silence statutes ordinarily should be constitutional. It would be difficult to imagine a statute whose

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[14] The statute invalidated in *Jaffree* (Alabama Code § 16-1-20.1 (Supp. 1984)) was enacted despite the presence in the Alabama Code of an earlier, facially neutral moment of silence provision. Alabama Code § 16-1-20 (Supp. 1984). Because Alabama could not "identif[y] any secular purpose [furthered by the second statute] that was not fully served" by the earlier legislation, the Court concluded that the second moment of silence provision "was intended to convey a message of State-approval of prayer activities in the public schools." 472 U.S. at 59, 61.

language and history are any freer of improper purpose than this one.

The New Jersey statute also lacks any other indicia of an improper legislative purpose to promote religion. Legislators advocated enactment of the statute on the basis of the secular purpose to restore order to the classroom. Moreover, the relationship between the moment of silence statute and prior proposed legislation demonstrated that the state would not approve any efforts to compel school prayer. Thus, enactment of a moment of silence did not convey any intention to force prayer into the schools. Accordingly, the court of appeals erred in holding that the statute violates the First Amendment because of the supposed lack of an appropriately "secular" purpose.

2. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993 (February 25, 1987), Slip op. 8 (footnote omitted). Legislative choice is not limited to what is required by the dictates of the Free Exercise Clause. *Id.* at 8 & n.10. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 791 (1983); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Thus, even if the purpose of Section 36-4 were to "promote religion" by accommodating some children's desire to have an opportunity to pray, that purpose could still be legitimate under the Establishment Clause.

Such accommodation, of course, is bounded by the Establishment Clause principles of *neutrality* (the state must not favor one religion over another, or communicate a message of endorsement of a particular religious practice) and *voluntarism* (the state may facilitate only religious choices that are independently adopted and may

not induce religious exercise). The appropriate distinction, then, is between the genuine desire to accommodate religious needs and the desire to use the resources and prestige of government to encourage or inculcate religion among the unwilling or the indifferent. See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

Here, to the extent the moment of silence statute accommodates religion, the accommodation is clearly permissible under this Court's precedents. The New Jersey statute is purely enabling, not prescriptive. It is silent as to religion, protecting " 'both the right to speak freely and the right to refrain from speaking at all.' " *Jaffree*, 472 U.S. at 51 (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977)). It is plainly not " an instrument for fostering public adherence to an ideological point of view [an individual] finds unacceptable.' " *Id.* at 51-52. At most, it provides a limited opportunity for those few children who wish to do so to pray prior to the beginning of the school day. The New Jersey moment of silence statute, simply put, is constitutionally unexcepticnable and should be upheld as a permissible accommodation of religion.

ARGUMENT

THE NEW JERSEY MOMENT OF SILENCE STATUTE, WHICH "PERMIT[S] STUDENTS TO OBSERVE A 1 MINUTE PERIOD OF SILENCE" FOR "PRIVATE CONTEMPLATION OR INTROSPECTION" DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

I. The New Jersey Moment Of Silence Statute Has A Constitutionally Permissible Purpose And Does Not Convey Any Message Of Endorsement Or Disapproval Of Religion.

The district court concluded that the New Jersey statute violated all three prongs of the *Lemon* test. J.S. App. 94a, 98a. The court of appeals correctly disagreed with the conclusion that the statute ran afoul of the "entanglement" or "effect" elements. *Id.* at 16a-22a. As the court of appeals found, a moment of silence statute does not foster excessive entanglement with religion or have the primary effect of advancing or inhibiting reliigon. *Lemon*, 403 U.S. at 612-613; *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968). A moment of silence, moreover, does not create the danger that the state or the church will intrude upon the affairs of the other, nor can it have the "effect on the minds and feelings of immature pupils" of advancing religion for the obvious reason that "it is unlikely that many children [will] use a simple 'moment of silence' as a time for religious prayer." *Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring). *See also id.* at 72 (O'Connor, J., concurring).

The court of appeals nevertheless affirmed the district court's holding that the statute was unconstitutional. It did so, however, on the ground that it did not find "clearly erroneous" (*id.* at 27a) the lower court's conclusion that the statute lacked an "overwhelming[ly] obvious and important secular purpose." *Id.* at 91a. The affirmance on this ground reflects a fundamental mis-

understanding of the inquiry into legislative purpose under *Lemon*.

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added) (citing *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam); *Epperson* v. *Arkansas*, 393 U.S. 97, 107-109 (1968); *Abington School District* v. *Schempp*, 374 U.S. 203, 223-224 (1963); *Engel* v. *Vitale*, 370 U.S. 421, 424-425 (1962)). A statute need have only "*a* secular purpose;" there is no requirement that it have " 'exclusively secular' objectives." *Lynch*, 465 U.S. at 681 n.6 (emphasis added). Moreover, the judicial search for that secular purpose "should be deferential and limited." *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring).[15] "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75. The lower courts' rejection of the New Jersey legislature's proffered secular purpose for the statute in the course of their search for an "overwhelming[ly] obvious and important secular purpose" (J.S. App. at 91a) was clearly erroneous.

The question whether a state statute has a secular purpose "cannot be answered in the abstract, but instead requires courts to examine the history, language and administration of a particular statute to determine whether it operates as an endorsement of religion." *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring). A balanced analysis of the language, history and administration of the

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[15] *See Everson* v. *Board of Education*, 330 U.S. 1, 6 (1947) (court should exercise "the most extreme caution" in assessing whether a state statute has a proper purpose).

moment of silence statute in this case reveals a legitimate secular basis for the statute.[16]

"[A] plausible secular purpose for the State's [moment of silence] program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388 at 394-395 (1983). The statute provides for a moment of silence, "before the opening exercises of each school day," to be used in the individual student's discretion "for quiet and private contemplation or introspection." Such a moment of contemplation serves the "solely secular ends" of "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). Indeed, the appellants introduced an expert witness and two educators from Sayreville, New Jersey, who testified that a moment of introspection before the start of a school day serves an important pedagogical function—it creates a boundary emphasizing "that school hours [are] a time for serious work rather than undisciplined play." J.S. App. 56a (Becker, J., dissenting). See *supra* notes 3, 8 & 9 and accompanying text.[17] Moreover, even the dis-

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[16] Appellant Karcher has argued that this Court "is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution." Jurisdictional Statement at 26 (citing *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984). *See* J.S. App. 43a-47a (Becker, J., dissenting) (arguing that *Bose* requires plenary review of record in this case). Although intervenors-appellants agree with appellant Karcher that the presence or absence of a "secular purpose" is a "constitutional fact" falling within the *Bose* standard, the Court need not resolve whether *Bose* applies to this case. The record here "simply does not demonstrate that the statute lacks any secular purpose." *Id.* at 59a (Becker, J., dissenting).

[17] The fact that appellees' witnesses disputed the pedagogical wisdom of a moment of silence is not constitutionally significant. *See* J.S. App. 83a-84a. "This program may be unwise and improvident from an educational or a community viewpoint. . . . [I]ndividual preferences, however, are not the constitutional standard." *Zorach*, 343 U.S. at 314. The New Jersey legislature has articulated a legitimate, secular purpose for its moment of silence

trict court acknowledged that "a brief period of silence serves a transition purpose." *Id.* at 83a. Accordingly, the court's ultimate conclusion that the statute nevertheless lacks a "secular purpose" is plainly wrong.

The district court compounded that error by concluding that the legislative history of the statute and its relationship to prior New Jersey prayer or contemplation statutes evidence an impermissible sectarian purpose. The legislative statement attached to the statute, as well as the legislative reports on the measure, reflect a secular goal: provision of a moment of silence "for quiet contemplation or introspection." J.S. App. 13a. Nothing outside these materials, moreover, demonstrates an impermissible legislative motivation.[18]

Appellees' witnesses testified that, during the legislative hearings on the statute, there were some individual legislators who expressed their desire to accommodate private, voluntary prayer. *Supra* note 7 and accompanying text. But this evidence, "given its paucity," was "at best underwhelming." J.S. App. 48a (Becker, J., dissenting). Moreover, as we argue in Part II, *infra*, this stated purpose is clearly legitimate. More important, however, appellees' witnesses admitted that the legislators articulated unquestionably legitimate secular purposes for the

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statute. The lower courts erred in striking down the statute based on testimony that the wisdom of that goal is debatable. *See* J.S. App. 83a-84a.

[18] Appellant Karcher has argued that searching judicial inquiry into the motivation of the New Jersey legislature is improper. *See* Jurisdictional Statement at 13-21. *See* also *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter"). Intervenors-appellants share appellant Karcher's legitimate objection to exacting judicial scrutiny of legislative motivation. Nevertheless, the evidence of legislative intent considered below (consisting mainly of eyewitness accounts of the legislative hearings and newspaper articles) plainly shows a legitimate secular purpose for the statute. *Supra* notes 2, 3 & 8 and accompanying text. The "legislative purpose" inquiry of *Lemon* demands no more.

legislation. *Supra* note 8 and accompanying text. The press coverage of the legislative process likewise evidences a secular goal on the part of the New Jersey legislature. Despite some reported references to prayer (*supra* note 1 and accompanying text), the newspaper articles introduced by appellees reflect that the statute was enacted to "provide [students] with a chance to acquire perspective" [19] and to "help restore order in the classroom." [20] *Supra* notes 2-3 and accompanying text. There is simply no basis for the lower court's pronouncement that the "statute had *no* secular purpose." *Jaffree*, 472 U.S. at 56.

The lower courts' rule—and the only rule under which an impermissible purpose can be ascribed to the statute—would invalidate *any* statutory accommodation of religion whenever *any* legislator made *any* comment in favor of religion. Such an approach would represent not an application of *Lemon*, but its replacement with a rule of *per se* invalidity for moment of silence statutes and other religious accommodations. It would also create a single-legislator veto power in any legislative opponent of such legislation. Such a result is improper. *Cf. Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring) (it is "disingenuous to look for a purely secular purpose" in a religious accommodation statute; "the Court should simply acknowledge that the religious purpose of [an accommodation] statute is legitimated by the Free Exercise Clause").

Nor is this a case, like *Jaffree*, where the relationship between the statute and prior legislative efforts demonstrates the "wholly religious character" of the moment of silence provisions. *Jaffree*, 472 U.S. at 58. Unlike the "Lord's Prayer" bills and the "prayer or meditation"

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[19] Robert G. Seidenstein, *The Star Ledger*, October 25, 1982 (Appellants' Letter Brief 5).

[20] Robert G. Seidenstein, *The Star Ledger*, December 14, 1982 (Appellants' Letter Brief 2).

provisions introduced into the New Jersey legislature at various times, the moment of silence statute makes no reference whatsoever to prayer. *Supra* note 10 and accompanying text. And, unlike all the prior statutes —which made participation by "all pupils" mandatory (J.S. App. 10a; see *id.* at 11a-13a)—the moment of silence statute merely "permit[s] students to observe a 1 minute period of silence to be used solely at the discretion of the individual student." Thus, any rational consideration of the relationship between prior New Jersey prayer or contemplation statutes and Section 36-4 can yield but one conclusion: the state legislature, over time, became increasingly sensitive to Establishment Clause concerns. It rejected attempts to return mandatory prayer to public classrooms (*cf. Jaffree*, 472 U.S. at 57-61), but approved a completely discretionary "contemplation or introspection" provision. While it is true that rights of conscience will bear but the " 'gentlest touch of governmental hand,' "[21] New Jersey has conscientiously kept its touch within constitutional limits.

Because the appellees filed this action almost immediately after Section 36-4 went into effect, there is virtually no evidence in the record concerning the administration of the statute. J.S. App. 8a. What evidence there is, however, shows that moments of silence have been administered in New Jersey without creating any Establishment Clause problems. Two educators testified that they had used a moment of silence since 1969 without any child or parent complaining that the practice promoted religion. Moreover, these educators found that the opportunity for introspection was "a helpful way to start the school day." J.S. App. 74a. This evidence negates any serious claim that the secular purpose for Section 36-4 is "pretextual." J.S. App. 27a.

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[21] *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) (quoting 1 Annals of Cong. 730 (J. Hales ed. 1789)).

The evidence in this case plainly shows that the New Jersey legislature was motivated by a proper secular purpose when it enacted the moment of silence statute. There is, in fact, no reliable evidence to the contrary.[22]

This Court has indicated that the fundamental inquiry under the "purpose" prong of *Lemon* is " 'whether the Government intends to convey a message of endorsement or disapproval of religion.' " *Jaffree*, 472 U.S. at 61 (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)). In the context of a moment of silence statute, the "crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring). Even a cursory review of the record below demonstrates that the New Jersey legislature plainly did not convey or attempt to convey any such message when it enacted the moment of silence statute. Indeed, the court of appeals expressly found that the State of New Jersey has not "encourage[d] prayer over other alternatives." J.S. App. 29a. As a result, the State's provision of a moment of silence for schoolchildren and teachers at the start of each school day does not exceed the strictures of the Establishment Clause.

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[22] Although the district court thought it "significant" that appellees' witnesses characterized the statute as "an attempt to return prayer to the public schools in another guise" (J.S. App. 71a), such "[c]ommunity perception is simply too amorphous and unreliable to provide the ground for constitutional decisions." *Id.* at 55a (Becker, J., dissenting). Indeed, Justice O'Connor has stated that federal courts must not "denigrate an expressed secular purpose" based on "testimony . . . by interested persons who witnessed the drafting of the statute." *Jaffree*, 472 U.S. at 75.

II. The New Jersey Moment Of Silence Statute "Merely Protect[s] Every Student's Right To Engage In Voluntary Prayer During An Appropriate Moment Of Silence During The School Day"[23] And Is A Constitutionally Permissible Accommodation Of Religion

Even assuming that Section 36-4 could be regarded as having some "non-secular" purpose, the court of appeals was clearly correct that such a finding does not end the inquiry because all efforts at accommodation of religion have in some sense a non-secular purpose. *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). The issue remains whether the statute nevertheless could be sustained as a permissible "accommodat[ion] [of] those students desiring the opportunity to engage in prayer at some point during the school day." J.S. App. 28a. Finding no unambiguous guidance in the previous decisions of this Court, the court of appeals concluded that a state may not "provide[] for a minute of silence for the purpose of permitting prayer by those who want to pray" even where the state does not "endors[e] prayer in preference to other forms of silent activity." *Id.* at 29a. The Establishment Clause does not require such an extreme result.

"In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 465 U.S. at 678. The fundamental goal of the Religion Clauses of the First Amendment is not the removal of all traces of religion from public life. On the contrary, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Id.* at 673. See *Marsh* v. *Chambers*, 463 U.S. 783, 791 (1983); *Zorach*, 343 U.S. at 314-315; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211 (1948). By providing its schoolchildren with

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[23] *Jaffree*, 472 U.S. at 59.

the opportunity for voluntary, private introspection at the start of each school day, the State of New Jersey has not transgressed constitutional limits. Rather, by "adjusting the schedule of public events to sectarian needs," it has "follow[ed] the best of our traditions." *Zorach*, 343 U.S. at 314.

The statute permits schoolchildren and teachers, at their discretion, to take a moment for purely voluntary and private meditation, contemplation or devotion. Ronald and Catherine Sokalski, intervenors-appellants here and parents of a child attending a New Jersey public school, reasonably believe that a moment of silence would be a positive and non-trivial element of their daughter's education during which she might take advantage of the opportunity to say a brief prayer before she begins her day in school. App., *infra*, 1a, 3a. Although the state may be under no constitutional command to provide such a moment,[24] its provision in the context of a public school —a structured, compulsory state institution where contemplative opportunities are limited—necessarily furthers values protected by the Free Exercise Clause. "[E]ven when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh* v. *Chambers*, 463 U.S. 783, 812 (Brennan, J., dissenting). See *Hobbie* v. *Unemployment Appeals Commission*, No. 85-993 (Feb. 25, 1987), slip op. 8. The Court has repeatedly stated that there is a channel —within which state legislatures and Congress may safely navigate—between what the Establishment Clause prohibits and the Free Exercise Clause requires. See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970). Though properly drawn moment of silence statutes are

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[24] The Court has noted that " 'it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day.' " *Jaffree*, 472 U.S. at 59 n.45 (quoting Brief for the United States as *Amicus Curiae* 10).

not mandated by the Free Exercise guaranty, they are within the range of permissible legislative choice.[25]

Indeed, in *Zorach* the Court recognized that, while public schools may not invite religious instructors into the school for purposes of religious instruction (*McCollum, supra*), government could nevertheless "accommodate[] the public service to [the students'] spiritual needs" by dismissing them to attend religious instruction. *Zorach*, 343 U.S. at 314. The government "may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Id.* But it can "suspend its operations" to permit private, voluntary devotion. *Id.* "No more than that is undertaken here." *Id.*

State efforts to facilitate opportunities for voluntary, private devotion in the public schools should be sustained so long as they do not infringe upon "the individual's freedom to choose his own creed." *Jaffree*, 472 U.S. at 52.[26] A statute such as New Jersey's, which

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[25] *Cf. Abington* v. *Schempp*, 374 U.S. 203, 299 (Brennan, J., concurring) ("hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion"). Nonmandatory religious accommodation by the government has a long history. For example, the First Congress debated whether the Second Amendment should provide that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 Annals of Cong. 434 (J. Gales ed. 1789). The language was deleted, in large part, because the decision whether to grant a religious exemption "ought to be left to the discretion of the Government." *Id.* at 750. This incident strongly supports the view that the various states have discretion to accommodate religious practice and belief. *See also* C. Anticau, A. Downey & E. Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*, 62-91 (1964) (describing numerous early examples of governmental cooperation with religion).

[26] *Cf. Zorach*, 343 U.S. at 314 ("Government may not finance religious groups nor undertake religious instruction nor blend sec-

simply "permit[s]" a moment "for quiet and private contemplation or introspection" at the sole "discretion of the individual student" (N.J.S.A. 18A: 36-4) is neutral among religions and between religion and nonreligion. The statute neither favors one religion over another, nor "'convey[s] a message of endorsement or disapproval of religion.'" *Jaffree*, 472 U.S. at 61 (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)). New Jersey students are, quite simply, "left to [their] own desires as to . . . [their] religious devotions, if any." *Zorach*, 343 U.S. at 311.[27] The New Jersey statute thus falls within the boundaries of permissible religious accommodation because it is both voluntary and neutral. A more striking example of permissible governmental "accommodation of all faiths . . . and hostility toward none" indeed "would be difficult to identify." *Lynch*, 465 U.S. at 677, 674.[28]

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ular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

[27] The New Jersey moment of silence statute is, if anything, less problematic than the released time program upheld in *Zorach*. A released time program advantages only religious students. By contrast, a moment of silence is completely neutral as between religious and nonreligious needs. A religious student may utilize the moment for prayer, an agnostic student for personal meditation, while yet another student may ponder an upcoming social event. *Cf. Jaffree*, 472 U.S. at 66 n.9 (Powell, J., concurring) ("[I]t is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child").

[28] Justice O'Connor has suggested that an "accommodation" analysis applies only when government action "lifts a government-imposed burden on the free exercise of religion." *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring). Although the Court's accommodation cases have not been strictly limited to instances where the government acts to lift government-imposed free exercise burdens (*Lynch, supra; Marsh, supra*), this case nevertheless falls within

An attempt "to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Jaffree*, 472 U.S. at 59; see also *Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring). First, "a moment of silence is not inherently religious." *Id.*[20] Second, "a pupil who participates in a moment of silence need not compromise his or her beliefs." *Id.* Third, a moment of silence involves no intrusion by the state into church affairs (*Lemon*, 403 U.S. at 614) and entails no interference with "the essential autonomy of religious life." *Marsh*, 463 U.S. at 803 (Brennan, J., dissenting). Finally, a simple moment of silence withstands objective characterization as governmental endorsement of an " 'official' or 'authorized' point of view on a matter of religion." *Marsh*, 463 U.S. at 806 (Brennan, J., dissenting). In sum, a neutral moment of silence statute, such as New Jersey's, does not pose any grave constitutional risks and therefore is a constitutional accommodation of

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this more restricted "accommodation" view. Unlike the situation in *Jaffree*, there is no other statutory provision in New Jersey which permits enjoyment of a moment of silence at the start of a school day. *Cf. Jaffree*, 472 U.S. at 84 (O'Connor, J., concurring) ("state law already provided a moment of silence to these appellees irrespective of [the challenged statute]"). Thus, the New Jersey statute does, in a very real sense, lift a state-imposed free exercise burden (the requirement that students attend school where moments for individual meditation are restricted) by providing a limited opportunity which can be used for private devotion or other contemplation. *Cf. Zorach, supra.*

[29] The New Jersey statute does not require any gesture, posture or attitude that necessarily connotes religious devotion. Although, as the district court noted, silence may be "one traditional form of prayer" (J.S. App. 82a), one simply cannot infer that all silent schoolchildren are praying. Thus, the statute requires neither that children engage or refrain from engaging in religious activity, nor that they be seen or perceived as so engaging or refraining.

religious preferences. *Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring).[30]

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[30] The weight of scholarly authority also supports the constitutionality of a provision such as the New Jersey moment of silence statute. *See* McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1; Smith, *Now is the Time for Reflection: Wallace v. Jaffree and its Legislative Aftermath*, 37 Ala. L. Rev. 345, 375 (1986) (a "meditation or prayer" statute should be constitutional if: (1) it is adopted in an atmosphere less charged with religious zeal than that found in *Jaffree*; (2) the statute is the initial legislation (unlike *Jaffree*, in which a "meditation or prayer" statute followed a "meditation" statute); (3) the "meditation or prayer" statute was adopted for secular as well as religious purposes; and (4) the "meditation or prayer" statute is part of an educational strategy to promote tolerance and student expression); Comment, *Accommodating Religion in the Public Schools*, 56 Nebr. L. Rev. 425, 450-454 (1980) (a moment of silence is a reasonable and acceptable means of accommodating religion in the public schools); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967) (a moment of silence does not constitute an advancement of religion, it is rather a permissible accommodation in the interest of religious liberty); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963) (moment of silence raises no serious constitutional concerns); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963) (a moment of silence cannot be fairly characterized as solely religious since no student can know the subject of other classmates' reflections and no one can be compelled to alter his or her thoughts; Tribe, *American Constitutional Law*, § 14-6 at 828-829 (1978) (a moment of silence should withstand Establishment Clause scrutiny because it is "arguably non-religious"); Freund, *The Legal Issue in Religion and the Public Schools* 23 (1965) (the concept of religious neutrality does not bar silent prayer or meditation in the public schools). *See also* Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 Rutgers L. Rev. 341, 355 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364, 372 (1983); Treiman, *Religion in the Public Schools*, 9 N. Ky. L. Rev. 229, 234-235 (1982). *But see contra* Comment, *Moment of Silence Statutes: An Improper Relation Between Church and State in Public Schools*, 54 U.M.K.C. L. Rev. 488, 509-510 (1986); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv L. Rev. 1874 (1983); Note,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364, 406 (1983).